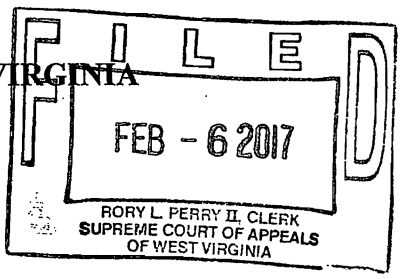
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 16-0802

CAVALRY SPV I, LLC

Plaintiff Below,
Petitioner,

v.

NANCY MCGARRY,

Defendant Below,
Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

CASES:

WEST VIRGINIA CASES

FEDERAL CASES

CASES FROM OTHER JURISDICTIONS

STATUTES:

WEST VIRGINIA STATUTES

OTHER STATUTES

RULES:

OTHER:

I. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

McGarry contends that oral argument is unnecessary under Rule 19 because Cavalry did not produce proper evidence under Rule 56 of the West Virginia Rules of Civil Procedure. In support of its motion for summary judgment, Cavalry produced a Platinum Invitation that was signed by McGarry and that incorporated the terms and conditions of a Customer Agreement governing the applicable statute of limitations. Those documents had been previously produced in Cavalry's discovery responses, and an authorized representative of Cavalry had "affirm[ed] that the foregoing is true to the best of [his] knowledge and ability based upon a review of [Cavalry's] files." The documents were of sufficient quality to allow Cavalry to set forth specific language from those documents in its summary judgment briefing. The lower court's decision to grant summary judgment notwithstanding the weight of those documents should be reversed.

II. ARGUMENT

A. Jurisdiction

By its Order of August 1, 2016, the lower court issued its opinion on Cavalry's liability *and* awarded McGarry statutory penalties under the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101, et seq. ("WVCCPA"). The Order is properly appealed to this Court because it was final for the purpose of W. Va. Code § 58-5-1, in that it "terminate[d] the litigation between the parties on the merits of the case and le[ft] nothing to be done but to enforce by execution what has been determined" *Syl. pt. 3, James M.B. v. Carolyn M.*, 193 W. Va. 289, 291, 456 S.E.2d 16, 18 (1995).

In her brief, McGarry contends that this appeal is premature because McGarry's petition for attorney's fees is still pending in the circuit court. **(Resp't Br. 5.)**[1] There does not appear to be any binding authority on this issue. This Court has determined, however, that an appeal can be made from an order determining liability (but not damages) "if the determination of damages can be characterized as ministerial." *Syl. pt. 3, C&O Motors, Inc. v. W. Va. Paving, Inc.*, 223 W. Va. 469, 471, 677 S.E.2d 905, 907 (2009). The calculation of attorney fees is a ministerial task. *See Karpacs-Brown v. Murthy*, 224 W. Va. 516, 525, 686 S.E.2d 746, 755 n.6 (2009). Furthermore, the Supreme Court of the United States has determined that "a claim for attorney's fees is not part of the merits of the action to which the fees pertain." *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200 (1988). Accordingly, "[a] question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order." *Id.* at 199.

B. Standard of Review

A circuit court's entry of summary judgment is reviewed de novo. *Syl. pt. 1, Painter v. Peavy*, 192 W. Va. 189, 190, 451 S.E.2d 755, 756 (1994). This Court is mindful that a "motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Syl. pt. 3, Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 160, 133 S.E.2d 770, 771 (1963). If the record taken as a whole cannot lead a rational trier of fact to find for the nonmoving party, summary judgment must be granted. *Parker v. Estate of Bealer,* 221 W. Va. 684, 687, 656 S.E.2d 129, 132 (2007) (*citing Williams v. Precision Coil, Inc.,* 194 W. Va. 52, 459 S.E.2d 329 (1995)).

[1] On August 31, 2016, Cavalry timely appealed the circuit court's August 1, 2016 order granting summary judgment to McGarry ("Order"). The circuit court order had directed McGarry to submit a fee petition, but McGarry did not petition for fees until October 5, 2016. **(A.R. 220.)**

C. Cavalry's debt collection complaint was timely filed.

1. The complaint was timely filed under West Virginia law.

McGarry argues that this Court should affirm the lower court's Order because Cavalry failed to prove the existence of a written agreement. **(Resp't Br. 7.)** She reasons that "[w]ithout an executed contract between the parties, the analysis should begin with West Virginia's borrowing statute." **(Resp't Br. 12.)** Despite her contention, the borrowing statute, W. Va. Code § 55-2A-2, does not apply to the collection of McGarry's credit card account because McGarry *had* expressly contracted for the applicable statute of limitations. Specifically, McGarry signed the Platinum Invitation application to apply for her Capital One credit card account and that application incorporated via her signature the Capital One Customer Agreement, which contained a provision governing the applicable statute of limitations. **(A.R. 147-48, 181-83.)**

The statute of limitations provision in the Customer Agreement specified that McGarry either waived the statute of limitations applicable to her account, or the statute of limitations was the *longer* period provided by Virginia or West Virginia law. **(A.R. 182.)** McGarry alleges that there is "no proof that [she] agreed to the terms" of the Customer Agreement. **(Resp't Br. 7.)** It is undisputed, however, that McGarry used the credit card on her Capital One account. **(A.R. 1 ¶ 4, 10 ¶ 4.)** Her use of the Capital One credit card after signing the Platinum Invitation application constitutes her agreement to the terms and conditions in the Customer Agreement. *See, e.g.*, *Wise v. Zwicker & Assocs., P.C.*, 780 F.3d 710, 712 (6th Cir. 2015) (explaining that the consumer "accepted the [credit card] offer by keeping and using the credit card"); *Brown v. Federated Capital Corp.*, 991 F. Supp. 2d 857, 861 (S.D. Tex. 2014) ("In the context of a credit card, a party is bound by the terms of a credit card agreement if the party uses the credit card,

even if the party does not sign the credit card agreement and even if the credit card agreement is not delivered to the party."); *Heiges v. JP Morgan Chase Bank, N.A.*, 521 F. Supp. 2d 641, 647 (N.D. Ohio 2007) ("[U]nder Ohio law credit card agreements are contracts whereby the issuance and use of a credit card creates a legally binding agreement. A creditor need not produce a signed credit card application to prove the existence of a legally binding agreement.") (internal quotations omitted).

Accordingly, McGarry entered into an express agreement regarding the terms and conditions of her credit card account (including the applicable statute of limitations). Pursuant to the Customer Agreement, West Virginia's five-year statute of limitations applying to unwritten contracts, rather than the three-year limitations period for unwritten contracts in Virginia, applied to the collection of McGarry's account. W. Va. Code § 55-2-6, Va. Code. Ann. § 8.01-246. McGarry made her last payment on the account on July 27, 2011, and Cavalry filed a debt collection complaint against her on September 15, 2015. (**A.R. 1-2, 87.**) Thus, Cavalry filed its debt collection complaint against McGarry within five years under West Virginia law.

Even if the parties had not expressly agreed to the statute of limitations period by McGarry's acceptance of the terms and conditions in the Customer Agreement — which they did — this Court has determined that the statute of limitations applicable to credit card accounts is five years from the date of the last purchase. *Asset Acceptance, LLC v. Grove*, No. 14-1265, 2015 WL 6143368, at *3 (W. Va. Oct. 16, 2015) (memorandum decision) (applying W. Va. Code § 55-2-6 to resolve statute of limitations claim). Further, a partial payment may restart the running of the statute of limitations. *Greer Limestone Co. v. Nestor*, 175 W. Va. 289, 296, 332 S.E.2d 589, 596 (1985). McGarry appears to have made her last purchase on the account on June 20, 2011, and she made her last partial payment on the account on July 27, 2011. (**A.R. 86,**

87.) Whether the statute of limitations began on the date of her last purchase (June 20, 2011) or the date of her last partial payment (July 27, 2011), Cavalry filed its September 15, 2015 complaint within five years and, therefore, met the statute of limitations regardless of what date triggered it.

2. The complaint was timely filed under Virginia or North Carolina law.

To the extent this Court determines that it must consider application of the borrowing statute, then Cavalry has produced a contract sufficient to satisfy the writing requirement of the statute of limitations. Even Virginia's Attorney General has opined:

> [I]t is my opinion that the statute of limitations for written contracts [which is five years] applies to credit card agreements in the situation where the agreement consists of a series of documents, provided that at least one of the documents referencing and incorporating the others is signed by the cardholder, and also provided that the written documents evidencing the agreement contain all essential terms of the agreement.

See Op. Att'y Gen., No. 10-128, 2011 WL 565650, at *1 (Feb. 7, 2011). McGarry signed the Platinum Invitation application on July 29, 2005. **(A.R. 183.)** Significantly, McGarry had a choice about whether or not to use the Capital One credit card after she signed that application. She chose to use the card, thereby incorporating the terms of the Customer Agreement, and she continued to use the card for almost six years, at least until the date of her last partial payment. **(A.R. 87.)** Thus, she created a written agreement for the purpose of determining the applicable statute of limitations. *See Phoenix Recovery Grp., Inc. v. Mehta,* 291 Ga. App. 874, 875, 663 S.E.2d 290, 292 (Ga. Ct. App. 2008) (explaining that, where credit card holder "both signed an application and used the credit card," the statute of limitations for written contracts applied). Even under the borrowing statute, Cavalry's debt collection complaint was timely.

McGarry contends that Cavalry cannot rely on the Platinum Invitation and Customer Agreement from Capital One because they were not authenticated by Cavalry. **(Resp't Br. 7-8.)**

The Platinum Invitation and Customer Agreement had been previously produced, however, in Cavalry's responses to McGarry's request for production of documents. **(A.R. 177-183.)** In those responses, an authorized representative for Cavalry "affirm[ed] that the foregoing is true and accurate to the best of [his] knowledge and ability based upon a review of [Cavalry's] files." **(A.R. 180.)** Cavalry then incorporated those responses in its reply to its motion for summary judgment and objection to McGarry's cross motion for partial summary judgment. **(A.R. 147).** Cavalry also set forth in its summary judgment briefing the precise language in the Customer Agreement that governed the applicable statute of limitations. **(A.R. 147.)** McGarry did not object to the inclusion of the Platinum Invitation and Customer Agreement in her summary judgment briefing, and the lower court did not make any findings regarding the authenticity of the documents in its Order. Rather, in its Order, the lower court limited its comments to the legibility of the documents.

To that end, McGarry agrees with the Court that the Customer Agreement was illegible. **(Resp't Br. 11.)** Cavalry concedes that the Customer Agreement is not a perfect reproduction of the original. However, there is a world of difference between a less-than perfect copy and an illegible copy. Cavalry could read the Customer Agreement at the time it attached the document to its summary judgment briefing, and it could read the document at the July 11, 2016 hearing on the parties' motions for summary judgment. It even set forth the language in the Customer Agreement that governed the applicable statute of limitations on those two occasions. **(A.R. 147, 194-95.)**

Importantly, Cavalry did not know that McGarry could not read the Customer Agreement until the hearing on the motions for summary judgment. Likewise, the circuit court never stated that the Customer Agreement was illegible during the hearing on the parties' motions for

summary judgment. When the court mentioned anything relating to the readability of the Customer Agreement, it appeared to be quoting material directly from a separate case:

> Now, this is again quoting from the Florida case of Capital One versus Gregorich, there is no apparently witness or affidavit that the 10-page shrunken optically produced micro text on two pages was actually attached to the signature card.

(A.R. 205.) The Court's focus at the hearing, much liked McGarry's focus in her briefing to this Court, was on whether there was a written agreement sufficient to satisfy the writing requirement of the statute of limitations. **(A.R. 195-205.)** Cavalry did not know that the lower court could not read the Customer Agreement until the court issued the Order.[2] If the trial court was unable to read the Agreement, it should have directed Cavalry to submit a different copy of the Agreement or look to any collateral evidence about the terms of that Agreement. It did neither, and the Order should be reversed.

D. Cavalry did not waive its objection to the calculation of statutory penalties under the WVCCPA.

In her counterclaim against Cavalry, McGarry contended that the single act of Cavalry filing a debt collection complaint against her was time barred, and she sought relief under the WVCCPA. **(A.R. 10-15.)** Following discovery, McGarry filed a cross motion for summary judgment, arguing — for the first time — that Cavalry's debt collection complaint *and* a letter Cavalry had sent to McGarry to collect on her delinquent credit card account both violated the WVCCPA. **(A.R. 136-37.)** The circuit court granted summary judgment in favor of McGarry, and awarded her $4,000 in statutory penalties for four violations of the WVCCPA, reasoning that "the WVCCPA sets each statutory violation $1000 per violation." **(A.R. 216.)** Cavalry explained in its opening brief to this Court that the statute authorizing statutory penalties under the WVCCPA, W. Va. Code § 46A-5-101, permits the recovery of only one penalty per act.

[2] At the hearing, the circuit court directed McGarry's counsel to draft the order. **(A.R. 207.)**

(**Pet'r Br. 14-15** (citing *Biser v. Mfrs. and Traders Trust Co.*, No. 5:15-CV-15761, 2016 WL 865324, at *2 (S.D.W. Va. Mar. 2, 2016); *Rice v. Green Tree Servicing, LLC*, No. 3:14-CV-93, 2015 WL 5443708, at *11 (N.D.W. Va. Sept. 15, 2015); *In re Machnic*, 271 B.R. 789, 794 (S.D.W. Va. 2002); *Knott v. HSBC Card Servs. Inc.*, No. 3:10-cv-82, 2010 WL 3522105, at *4 (N.D.W. Va. Sept. 8, 2010).) Thus, at most, the lower court could have awarded McGarry $2,000 for two acts that allegedly violated the WVCCPA.

Importantly, McGarry does not appear to disagree with Cavalry that the Court miscalculated the amount of statutory penalties awarded to her under the WVCCPA.[3] Rather, McGarry suggests that Cavalry waived any objection to the calculation of statutory penalties awarded to her under the WVCCPA because it "did not address the damages issues in its response to the cross motion for summary judgment . . . and then failed to raise the issue at the hearing where the summary judgment motions were heard." **(Resp't Br. 16.)**

In its summary judgment briefing, Cavalry repeatedly requested that the court grant summary judgment in favor of Cavalry regarding McGarry's counterclaims. **(A.R. 29, 175.)** Such a request inherently objected to the award of *any* damages on McGarry's claims. To the extent McGarry argues that Cavalry did not object to a precise award of $4,000 in statutory penalties under the WVCCPA in its summary judgment briefing, she is correct. But McGarry overlooks that she did not make any such request in her cross motion for summary judgment. Importantly, McGarry sought only *partial* summary judgment for her WVCCPA claims, specifically requesting that the Court "reserve the determinations of damages for the jury." **(A.R. 137.)**

Then at the hearing on the parties' motions for summary judgment, McGarry waived her claim for actual damages and advised that she would "just take the statutory damages for those

[3] McGarry notes only that Cavalry cited federal district court cases in West Virginia. **(Resp't Br. 17 n.3.)**

four, the WVCCPA each of them are statutorily now $1,000, there is no more discretion since the Code was changed, so they would just be $1,000 each and then attorney's fees." **(A.R. 206.)** The Court then asked McGarry's counsel to submit a proposed order awarding McGarry "statutory damages of $1,000 a piece." **(A.R. 207.)** Cavalry objected to the denial of its motion for summary judgment, and the court noted Cavalry's objection "to the adverse rulings" in its Order. **(A.R. 207, 216.)** Nonetheless, it is not clear from the record that McGarry actually requested a total of $4,000 in statutory penalties under the WVCCPA. Although McGarry indicated that she would take "statutory damages for those four," there were only two acts that allegedly violated the WVCCPA: (1) the debt collection letter that Cavalry sent to McGarry on September 29, 2014; and (2) Cavalry's act of filing a debt collection complaint against McGarry. McGarry has never contended that there are more than two acts and she does not contend now that she is entitled to more than two statutory penalties for those two acts. Thus, it would not have mattered if McGarry had advised the Court that she would accept statutory penalties for four, five, or six of alleged violations of the WVCCPA. She could not receive more than two statutory penalties if only two acts were at issue, regardless of how many sections of the WVCCPA those acts allegedly violated. Cavalry did not object to an award of $4,000 at the hearing because McGarry did not specifically request that amount. It was only when the lower court entered judgment against Cavalry in the Order that the miscalculation of the statutory penalties under the WVCCPA was first made. Accordingly, if this Court affirms the circuit court's ruling as to Cavalry's liability for two acts in violation of the WVCCPA, it should vacate the award of damages and remand with instructions for the court to recalculate the applicable statutory penalties.

III. CONCLUSION

WHEREFORE, Cavalry respectfully asks this Honorable Court to reverse the circuit court's decision granting McGarry summary judgment or remand this case so that the lower court may request a different version of the Customer Agreement to determine (1) whether the Customer Agreement contains language governing the applicable statute of limitations; and (2) whether the Customer Agreement is part of the agreement McGarry had with Capital One. In the alternative, Cavalry requests that this Court vacate the amount of statutory penalties awarded to McGarry under the WVCCPA and remand with instructions to reduce the award from $4,000 to $2,000.

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CERTIFICATE OF SERVICE

I, Don C. A. Parker, counsel for Cavalry SPV I, LLC, hereby certify that service of the "**Petitioner's Reply Brief**" has been made by placing a true copy thereof in an envelope deposited in the regular course of the United States Mail, postage prepaid, on February 6, 2017, addressed as follows:

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